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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 1055

HONORABLE W. HAROLD COX, UNITED STATES DISTRICT JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI,

Petitioner,

VS.

THE HONORABLE ROBERT E. HAUBERG, UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, AND THE HONORABLE NICHOLAS DEB. KATZENBACH, ACTING ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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THE HONORABLE ROBERT E. HAUBERG, UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, AND THE HONORABLE NICHOLAS DEB. KATZENBACH, ACTING ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on January 26, 1965.

CITATIONS TO OPINIONS BELOW

The order of the United States District Court for the Southern District of Mississippi rendered on October 22, 1964, is not reported, and is set forth in the Appendix, hereto, *infra*, p. A59. The opinion of the United States Court of Appeals for the Fifth Circuit rendered January 26, 1965, is not reported, and is set forth in the Appendix hereto, *infra*, p. A1.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 26, 1965 (R. 197). The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Did the United States District Court for the Southern District of Mississippi, established pursuant to Article III of the Constitution of the United States, act within its power and authority in entering its order of October 22, 1964, directing the United States Attorney, an officer of said Court, to sign indictments which a duly constituted grand jury had voted to bring and had requested him to prepare.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional provisions and statutes of the United States, the full text of which are set forth in the appendix hereto:

Art. II, Sec. 3, United States Constitution.

Art. III, United States Constitution.

The Fifth Amendment to the Constitution of the United States.

Rule 6(d)(e), Federal Rules of Criminal Procedure.

Rule 7(c), Federal Rules of Criminal Procedure.

Rule 48(a)(b), Federal Rules of Criminal Procedure.

Title 28, United States Code, Sec. 1291.

Title 28, United States Code, Sec. 1254(1).

STATEMENT OF THE CASE

On October 22, 1964, the United States District Court for the Southern District of Mississippi, while sitting in the Jackson Division adjudged the United States Attorney, Respondent, guilty of civil contempt of Court and imposed a jail sentence upon him until he purged himself of this contempt.

Prior to this citation for contempt, the grand jury impaneled for the Southern District of Mississippi had been charged on different occasions by both judges of the Southern District of Mississippi, inter alia, that the grand jury had the power and authority to investigate any crimes known to them on their own initiative and to return indictments against anyone whom they found to probably be guilty of the violation of any federal criminal law. The United States Attorney was expressly extended an opportunity to except to such charges but took no exception to them. The grand jury convened in Biloxi, Mississippi, on September 9, 1964, and was recessed by Judge Mize to reconvene in Jackson, Mississippi, on October 21, 1964, at which time Chief Judge W. Harold Cox would be the presiding judge. The grand jury had commenced hearing a matter at Biloxi, Mississippi, which was not presented

to them by the United States Attorney and he objected to such proceedings and induced the Court to persuade the grand jury to desist from the investigation then in progress until Chief Judge W. Harold Cox could decide the propriety of the investigation. The transcript of the grand jury proceedings at Biloxi, Mississippi, revealed that the grand jurors were intensely interested in this investigation and one of the grand jurors strenuously objected to not being allowed to conclude the investigation. Upon reconvening at Jackson, Mississippi, the foreman of the grand jury made known to Chief Judge W. Harold Cox, who was then presiding, that their investigation had been interrupted by objections from the Department of Justice.

The grand jurors were at this time instructed by the Court that they had the power and authority to hear any witnesses or make any investigation they desired, regardless of whether or not these matters were presented to them by the United States Attorney or by assistants, and regardless of any contrary views that these Government attorneys might have as to the matters under investigation. The United States Attorney then advised the Court that he had instructions from the Department of Justice to stay out of the grand jury room during any such proceedings. He was instructed by the Court in the presence of the grand jury that he should not interfere in any way with the grand jury and that if he were not going to assist them that he should consider staying out of the grand jury room. The United States Attorney took no exception to this charge.

Later, on October 21, 1964, the United States Attorney went to the chambers of Chief Judge W. Harold Cox and asked if the Court did not think it advisable and would be helpful for him to go into the grand jury room and explain to the grand jury the crime of perjury and to inform them as to some important court decisions on that

question. The Chief Judge agreed with his views and expressly granted him permission to go into the grand jury room at that time for this purpose. The United States Attorney and his assistant went into the grand jury room and remained there throughout the entire session of the grand jury and until it was recessed on the next day, by reason of the refusal of the United States Attorney, to prepare indictments which he was requested to do by the grand jury.

On October 22, 1964, the grand jury advised the Court of its desire to make a report to the Court. The Court thereupon convened and was informed by the foreman of the grand jury in the presence of the United States Attorney and his assistant that they had refused to prepare certain indictments which had been requested of them by the grand jury. The Court then ordered the United States Attorney to disregard any instructions that he had received from the Department of Justice and the United States Attorney General as to the preparation of these indictments and to prepare such indictments as had been requested of him by the grand jury. He was further allowed one hour within which to communicate with the Department of Justice and the then Acting Attorney General to inform them of his instructions by the Court under penalty of contempt. After such time the Court then again convened and the United States Attorney reiterated his position and read into the record the instructions he had received from the Acting Attorney General which was in effect, to disregard such order and instructions of the Court. The Court thereupon adjudged the United States Attorney guilty of civil contempt and ordered that he be incarcerated in jail until he purged himself of this contempt.

On October 23, 1964, Robert E. Hauberg, United States Attorney, and Nicholas deB. Katzenbach, Acting Attorney

General of the United States, filed a notice of appeal from the order entered by the United States District Court on October 22, 1964, adjudging the United States Attorney guilty of civil contempt and committing him for confinement and ordering the issuance of a citation to the Acting Attorney General directing him to appear and show cause why he should not be adjudged guilty of contempt. On October 23, 1964, a stay order was entered by the Court of Appeals for the Fifth Circuit pending appellate proceedings pursuant to the provisions of Title 28, U.S.C., Sec. 1291. In addition to the appeal of the United States Attorney, a petition for a writ of prohibition was filed on behalf of the Petitioners, the United States Attorney and the Acting Attorney General of the United States. Thereafter, both the Petitioners and Appellants and Respondent and Appellee filed respective designations of record, stipulation for accelerated brief schedule and hearing, answer of the respondent, W. Harold Cox, United States District Judge, counter-designation of additional portions of the record and briefs. The appeal, being cause No. 22,019 and the petition for writ of prohibition being cause No. 22,018, were consolidated for hearing by the Court of Appeals for the Fifth Circuit by an order dated October 26, 1964, and both matters heard, en banc on December 18, 1964, on oral argument.

On January 26, 1965, the Court of Appeals for the Fifth Circuit rendered its unanimous opinion dismissing the appeal of the Acting Attorney General and denying the petition for a Writ of Prohibition. Upon a four to three decision of the seven Circuit Judges participating, the Order of the United States District Court requiring the Honorable Robert E. Hauberg, United States Attorney, to prepare and sign certain indictments which he had been requested to prepare by a duly constituted grand

jury, was reversed. Three of the Circuit Judges were of the opinion that the Order of the United States District Judge requiring the United States Attorney to *prepare* and *sign* the requested indictments constituted an encroachment upon the authority of the Executive Department and could not be enforced. Three of the Circuit Judges were of the opinion that the Order of the United States District Judge was valid and could be enforced. One of the Circuit Judges was of the opinion that the Order of the District Judge was valid and enforceable insofar as it required the United States Attorney to *prepare* said indictments, but that the portion of the order requiring said United States Attorney to *sign* said indictments was unenforceable. The order being in the conjunctive requiring the United States Attorney to *prepare* and *sign* said indictments, it was the opinion of the majority that the Order of October 22, 1964, of the United States District Court to Honorable Robert E. Hauberg, United States Attorney, should be reversed.

There were four different opinions written and recorded by the United States Court of Appeals for the Fifth Circuit, see Appendix, *infra*, pages A1 to A57.

It is the judgment of the United States Court of Appeals for the Fifth Circuit reversing the Order of the United States District Court upon the appeal of Honorable Robert E. Hauberg, United States Attorney, only, which petitioner requests this Court to review.

REASONS FOR THE ALLOWANCE OF THE WRIT

As shall appear from the argument to follow, this writ should be allowed for the following reasons: (1) the Court of Appeals for the Fifth Circuit has decided in this

cause important federal jurisdictional and procedural issues which have not been, but should be, settled by this Court; (2) there exists a conflict between the decision of the Court of Appeals for the Fifth Circuit in this cause with the decisions of other Courts of Appeals involving some of the same questions herein presented; and (3) the Court of Appeals for the Fifth Circuit has in this cause rendered an opinion which is in conflict with decisions of the United States Supreme Court.

ARGUMENT

POINT 1

The Court of Appeals for the Fifth Circuit in This Cause Has Decided Important Federal Jurisdictional and Procedural Issues Which Have Not Been, But Should Be, Settled by This Court

The holding of the majority in the court below that the Attorney General of the United States has the discretionary power to prevent an indictment of a federal grand jury by directing the United States Attorney to withhold his signature wholly ignores the traditional broad inquisitorial powers of the grand jury, and limits the constitutional requirements of Amendment V to the United States Constitution to the benefit of the accused.

This conclusion of the lower court is contrary to the many cases and articles describing the history, tradition and current role, functions, powers and duties of grand juries. See *United States* v. *Smythe*, 104 F.Supp. 283-309 (N.D. Cal., 1952); *Sullivan* v. *United States*, 348 U.S. 170, 173, wherein this court stated:

> "It is elementary that a Federal grand jury has the unquestioned right and duty to inquire into any matter within the jurisdiction potentially involving viola-

> tions of law and to return an indictment if it finds a reasonable probability that a crime has been committed. This it may do at the instance of the court, the United States Attorney, the Attorney General or on its own initiative, from evidence it may gather or from knowledge of its members."

citing numerous other cases; see also Orfield, The Federal Grand Jury, 22 F.R.D. 343-463 (1958). Professor Orfield writes:

> "The grand jury serves two great functions. (Citing cases) One is to bring to trial persons accused of crime upon just grounds. The other is to protect persons against unfounded or malicious prosecutions by insuring that no criminal proceeding will be undertaken without a disinterested determination of probable guilt. The inquisitorial function has been called the more important."

The holding of the majority in the lower court is contrary to the heretofore unquestioned right of a federal grand jury to inquire into any matter within the jurisdiction involving violation of laws of the United States and to return an indictment if it finds a reasonable probability that a crime has been committed based upon evidence gathered through its own initiative and/or from knowledge of its own members, a right which has been recognized since the inception of the grand jury. *Sullivan* v. *United States, supra; Hale* v. *Henkel,* 201 U.S. 43, 50 L. Ed. 652, 26 S. Ct. 370; *United States* v. *Thompson,* 251 U.S. 407, 64 L. Ed. 333, 40 S. Ct. 289; *Blair* v. *United States,* 250 U.S. 273, 63 L. Ed. 979, 39 S. Ct. 468; and numerous other decisions.

The holding of the majority in the court below ignores the age old fact that it is the grand jury, an arm of the judiciary under the constitutional separation of powers doctrine, and not the Attorney General of the United States or the United States Attorney, as an arm of

the Executive, that has the power and responsibility of finding and returning an indictment. The Fifth Amendment to the Constitution of the United States provides "No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a grand jury . . ." The fact that the responsibility of finding and returning an indictment rests solely upon the grand jurors is made clear by the provisions of *Rule 6(d), F. R. Crim. P.* ". . . No person other than the grand jurors may be present while the grand jury is deliberating or voting."

The holding of the majority that "The affixing or withholding of the signature (of the government attorney) is a matter of Executive discretion which cannot be coerced or reviewed by the courts," is in direct conflict with *Rule 7(c), F. R. Crim. P.* which provides that the indictment "shall be signed by the Attorney for the Government." It is needless to say that Rule 7(c) is the product of this court which was given the effect of statute law by an act of the Congress of the United States and was in force and effect at the time of the entry of the Order of October 22, 1964, by the United States District Court in question here.

The interpretation of the majority of the lower court of *Rule 48(a), F.R. Crim. P.* providing that ". . . the Attorney General or the United States Attorney may by *leave of Court* file a dismissal . . ." wherein doubt is expressed as to the constitutionality of said Rule unless a discretionary power of the United States Attorney to prevent an indictment by withholding a signature of the government attorney is contrary to the clear intent and meaning of said Rule as adopted by this Court and made law by the Congress of the United States. According to the history of the Rule and the ordinary meaning of the language used therein,

it was primarily intended to authorize the court to protect defendants and not to confer prosecutive functions upon the court, *United States* v. *Greater Blouse, Skirt & Neckwear Contractors Assn.*, S.D. N.Y. 1964, 228 F.Supp. 483, 489-490.

Petitioner submits that the holdings of the majority in the lower court as above outlined, if permitted to stand, will greatly jeopardize the proper administration of criminal laws and criminal justice.

We invite the Court's attention to a few of the numerous cases wherein this court has granted certiorari in cases involving important federal jurisdictional and procedural issues affecting the power and functions of the federal judiciary, the administration of criminal justice and the construction of the Federal Rules of Criminal Procedure:

Pollard v. *U. S.*, 352 U.S. 354, 1 L. Ed. 2d 393, 77 S. Ct. 481;

McNabb v. *U. S.*, 318 U.S. 332, 341, 87 L. Ed. 819, 63 S. Ct. 608, reh. den. 319 U.S. 784, 87 L. Ed. 1727, 63 S. Ct. 1322;

Green v. *U. S.*, 356 U.S. 165, 2 L. Ed. 2d 672, 78 S. Ct. 632;

Mallory v. *U. S.*, 354 U.S. 449, 1 L. Ed. 2d 1479, 77 S. Ct. 1356;

Carroll v. *U. S.*, 354 U.S. 394, 1 L. Ed. 2d 1442, 77 S. Ct. 1332;

Heflin v. *U. S.*, 358 U.S. 415, 3 L. Ed. 2d 407, 79 S. Ct. 451;

Pittsburgh Plate Glass Co. v. *U. S.*, 360 U.S. 395, 3 L. Ed. 2d 1323, 79 S. Ct. 1237;

Rosenberg v. *U. S.*, 360 U.S. 367, 3 L. Ed. 2d 1304, 79 S. Ct. 1231;

Fung Foo v. *U. S.*, 369 U.S. 141, 7 L. Ed. 2d 629, 82 S. Ct. 671.

POINT 2

There Is a Conflict in the Decision of the Court of Appeals for the Fifth Circuit in This Cause with Decisions of Other United States Courts of Appeals Involving Some of the Same Questions Here Presented

The holding of the majority in the court below that "if the attorney refuses to sign, as he has the discretionary power of doing, we conclude that there is no valid indictment", and "(I)t is not to be supposed that the signature of counsel (the government attorney) is merely an attestation of the act of the Grand Jury," (App. p. A7), is in direct conflict with *Wheatley* v. *United States*, 4 Cir. 1946, 159 F.2d 599, where the rule was well stated as follows by Judge Soper, Judges Parker and Dobie concurring:

> "It has been held that the signature of the prosecuting attorney is no part of the indictment and is necessary only as evidence of the authenticity of the document; and it has also been held that the improper signing of an indictment is not such a defect as would invalidate the instrument; In re Lane, 135 U.S. 443, 449, 10 S. Ct. 760, 34 L. Ed. 219; Miller v. United States, 6 Cir., 300 F. 529, 536, certiorari denied 266 U.S. 624, 45 S. Ct. 123, 69 L. Ed. 474; King v. United States, 5 Cir., 279 F. 103, 104; United States v. McAvoy, C.C.N.Y., 26 Fed. Cas. (No. 15,654) 1044, 1045."

See also *Abramson* v. *United States*, 5 Cir. 1964, 326 F.2d 565, 567; *United States* v. *Keig*, 7 Cir. 1964, 334 F.2d 823; and *Wiltsey* v. *United States*, 4 Cir. 1955, 222 F.2d 600.

We respectfully submit that the conflicts created by the split opinion of the lower court in this case with the decisions of the other Courts of Appeals above cited is ample justification for the granting of certiorari as prayed for herein.

We invite the Court's attention to the following cases, among the many, wherein this Court has granted certiorari because a Court of Appeals decision was in conflict with decisions of other Courts of Appeals:

Brunning v. *U. S.*, Cal. 1964, 376 U.S. 58, 11 L. Ed. 2d 772, 84 S. Ct. 906;

DiBella v. *U. S.*, Fla. & N.Y. 1962, 369 U.S. 121, 7 L. Ed. 2d 614, 82 S. Ct. 654;

LaBuy v. *Howes Leather Company*, 1957, 352 U.S. 249, 1 L. Ed. 2d 290, 77 S. Ct. 309, reh. den. 352 U.S. 1019, 1 L. Ed. 2d 560, 77 S. Ct. 553;

Affronti v. *U. S.*, Mo. 1955, 350 U.S. 79, 100 L. Ed. 62, 76 S. Ct. 171.

POINT 3

The Opinion of the Court of Appeals for the Fifth Circuit in This Cause Is in Conflict with Decisions of the United States Supreme Court

The holding of the majority in the court below that, "The signature of the government attorney is necessary to the validity of the indictment" and "(I)t is not to be supposed that the signature of counsel (the government attorney) is merely an attestation of the act of the Grand Jury", is in direct conflict with *Crowley* v. *The United States*, 1903, 194 U.S. 461, 475, in which this court said:

> "The *indictment* embodies charges made by grand jurors, and *the signature of the United States Attorney merely attests the actions of the grand jury*, whereas *information* rests upon the responsibility of the attorney representing the government and imports an investigation of the facts by him in his official capacity."

See also *In re Lane*, 1890, 135 U.S. 443, 449, 34 L. Ed. 219, 10 S. Ct. 760.

The holding of the majority in the court below that the United States Attorney has the discretionary power to prevent an indictment by withholding his signature is in conflict with *United States* v. *Thompson*, 251 U.S. 407, 413-415; *Blair* v. *United States*, 250 U.S. 273, 282; *Hale* v. *Henkel*, 201 U.S. 43, 61-66; *Frisbie* v. *United States*, 157 U.S. 160, 163; *Sullivan* v. *United States*, 1954, 348 U.S. 170, 173; *Ex Parte United States*, 1932, 287 U.S. 241, wherein this court has consistently held that the Executive Department acting through the Attorney General of the United States, his assistants and the United States Attorney have no authority to curtail or limit the well recognized power of the grand jury to consider, investigate and make inquiry into any matter within the jurisdiction involving violation of the laws of the United States and to return an indictment into open court if it finds a reasonable probability that a crime has been committed.

Because of the conflicts created by the opinion of the lower court with the aforesaid opinions of the Supreme Court of the United States, we submit that certiorari should be granted, *U. S. Steel Workers of America, AFL-CIO* v. *N.L.R.B.*, N.Y. 1964, 376 U.S. 492, 11 L. Ed. 2d 863, 84 S. Ct. 899; *Pa. R.R. Co.* v. *O'Rourke*, N.Y. 1953, 344 U.S. 334, 97 L. Ed. 367, 73 S. Ct. 302.

CONCLUSION

For the reasons above set forth, Petitioner prays that this Court grant this petition for a writ of certiorari and review the judgment of the Court of Appeals for the Fifth Circuit in this cause.

Respectfully submitted,

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